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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1999

JIM POOLE,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

JIM POOLE PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI ENTERED IN THE ABOVE-ENTITLED CASE ON MARCH 11, 1974; AND DENIED FOR REHEARING ON APRIL 8, 1974

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OPINION BELOW

Opinion of the Supreme Court of the State of Mississippi is reported in 291 So.2d 723 and is appended hereto as a part of this Petition.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C., Sec. 1257(3) and Rule 19(B) of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States of America:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added).

2. Amendment XIV to the Constitution of the United States of America:

> "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law."

QUESTIONS PRESENTED

1. Was due process denied Defendant in conflict with prior United States Supreme Court decisions when the Mississippi Supreme Court held that the State was not obligated nor did it have a duty to allow Defendant to have a timely requested independent analysis made of substance allegedly bought from the Defendant by a narcotics agent where State Crime Laboratory had consumed all of the substance through chemical analysis prior to the Defendant's arrest?

2. Does the State's duty of disclosure extend to the duty of preservation, which extends to all "discoverable" evidence, defined as including all evidence which might have to be produced under *Brady v. Maryland*, previously decided by this Court?

STATEMENT OF THE CASE

The Petitioner, Jim Poole, was convicted in the Circuit Court of Jackson County, Mississippi, after trial by jury on a charge of sale of Lysergic Acid Diethylamide (LSD) for which he was sentenced to ten (10) years in prison.

An appeal was prosecuted to the Supreme Court of the State of Mississippi, and a decision was rendered on March 11, 1974, said case being reported in 291 So.2d 723, a copy of which is appended hereto. Re-hearing was denied on April 8, 1974. The federal questions relating to the violation of constitutional rights were raised by motion on the trial in the Circuit Court of Jackson County, Mississippi, and on the subsequent appeal to the Mississippi Supreme Court.

SUMMARY OF THE ARGUMENT

A. In its decision in the instant case the Mississippi Supreme Court misinterpreted the teachings of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194.

In *Brady, supra*, this Court said:

> "We now hold that the supression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

A pill or capsule of LSD was submitted by a narcotics agent to the Mississippi Crime Lab which pill had allegedly been bought from the Petitioner, Jim Poole. This pill was split in half by the Crime Lab and a test run on one half of the pill on July 28, 1972. The toxicologist testified she had found it to contain LSD. The second half of the pill was subsequently consumed by analysis on October 26, 1972. The toxicologist testified the second analysis was run to ascertain if there were substances in the pill other than LSD. The defendant, petitioner here, was arrested three months later, on February 14, 1973, and was indicted by the Grand Jury in April, 1973. After indictment petitioner made a timely motion for production of a portion of the substance which he allegedly sold to a narcotics agent for the purpose of independent analysis. The petitioner was then informed by a letter that the entire pill had been consumed by chemical analysis by the Mississippi Crime Lab.

The Mississippi Supreme Court in its decision stated as follows as to *Brady, supra*:

> "This case is not applicable for several reasons. First, no indication exists that the evidence was

favorable to the accused. Secondly, there is no intimation in this record of any ''"suppression by the prosecution."' At the pre-trial hearing, the prosecution presented the defense with a letter from the Mississippi Crime Laboratory informing the defendant that no part of the substance analysis. The testimony of Harriet Pfaffman, the toxicologist for the Crime Laboratory, and Dr. Arthur Hume, the director, indicates there was no effort on their part to suppress intentionally the evidence from the defendant. *Brady* is inapplicable to this case."

Miss Pfaffman's testimony during the trial reveals that the capsule had been split in half and that she used one half of the pill for analysis on July 28, 1972, at which time she testified she found the tablet to contain LSD and that she ran the test on the second half of the pill on October 26, 1972.

In *Moore v. State of Illinois*, 408 U.S. 785, 33 L.Ed.2d 706, 92 S. Ct. 2562, this Court said:

"The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defence, and (c) the materiality of the evidence . . ."

Although *Brady, supra*, said that suppression may be either in bad faith or good faith, nevertheless, the Mississippi Supreme Court chose to make the suppression an intentional one left to the defendant to prove that such suppression was intentional.

The requirement that the evidence be favorable to the defendant in the instant case could not be shown nor revealed since none of the pill was available for independent analysis when the defendant made a timely

motion for the production of a portion of the tablet. How, then, could the Mississippi Supreme Court find that there was no indication that the evidence was favorable to the accused? We respectfully suggest the Mississippi Supreme Court has not given the full import to the teachings of *Brady, supra.*

B. Where evidence is material with probative value, the prosecution is charged with a duty of preservation for the purpose of disclosure and if the guilt or innocence of the accused is dependent upon such material evidence and if the prosecutorial branch fails to preserve such evidence, either in good faith or bad faith, and is unable to disclose such evidence upon timely request being made, then the indictment against the accused must be dismissed.

This question previously has not been before this Court.

An accused must be found guilty beyond a reasonable doubt.

We submit *Brady*, supra, applies.

Prior to its decision in the instant case, the Mississippi Supreme Court in *Jackson v. State* 243 So.2d 396, stated:

> "The guilt or innocence, prison sentence or acquittal, of the defendant depends entirely upon the identification of the contents of the boxes of marijuana.
>
> This substance was relevant, and in fact, necessary evidence to defendant's conviction. Under this circumstance we are of the opinion that due process of law required, upon the Court's attention being directed thereto by Motion, that the analysis of the substance not be left totally within the province of the State Chemist. The defendant

having made proper and timely motion for portion of the substance, it should have been made available to his attorney, as an officer of the Court, and under such safeguards as the trial court deemed necessary for inspection and analysis. We hasten to add that this opinion is limited to the alleged possession of sale of a prohibited substance where the outcome of the case is dependant upon its identification as contraband. We conclude, therefore, that the lower Court erred in not sustaining the Defendant's Motion for portion of the seized substance."

We submit that in the instant case the Court completely reversed itself from its decision in *Jackson, supra*, when the court said:

"*Jackson* applies where the state has some of the substance. The narrow question before the Court is whether the case against defendant should be dismissed when the state is unable to make the substance available to defendant because it was consumed in the process of analysis."

We further submit that the Mississippi Supreme Court's decision in *Jackson, supra*, would have lulled the defendant into a false sense of security if the state, through good faith or bad faith, had consumed the substance through analysis. The Court had said that analysis of the substance not be left totally within the province of the State Chemist.

The Mississippi Supreme Court in *Jackson, supra*, was eminently correct in its decision.

As this Court said in *United States v. Ash*, 37 L.Ed.2d 619:

"Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld testimony of witnesses may be manipu-

lated: *the results of laboratory test may be contrived.* In many ways the prosecutor, *by accident or by design* may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may " 'strike hard blows" ' but not " 'foul ones" '. Burger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S. Ct. 629 (1935); Brady vs. Maryland, 373 U.S. 83, 87-88, 10 L.Ed.2d 215, 88 S. Ct. 1194 (1963). If the safeguard fails, review remains available under due process standards. See Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S. Ct. 763 (1972); Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 55 S. Ct. 340, 98 ALR 406 (1935); Miller v. Pate, 386 U.S. 1, 17 L.Ed.2d 690, 87 S. Ct. 785 (1967); Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S. Ct. 1038 (1973). These same safeguards apply to misuse of photographs. See Simmons v. United States, 390 U.S., at 384, 19 L.Ed.2d 1247." (Emphasis added)

In *United States v. Bryant*, 439 F.2d 642 (1971), the United States Court of Appeals, District of Columbia Circuit, said:

"Technically, it may be that evidence which cannot be found is not in the governments " 'possession" '. And, of course, that which the government does not have it cannot disclose. But this line of reasoning is far to (sic) facile, and clearly self-defeating. The language of *Brady*, rule 16 and the *Jencks Act* includes no reference to the timing of possession and suppression. It is most consistant with the purposes of these safeguards to hold that the duty of disclosure attaches in some form once the government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before Defendants know of its existence. Hence we

hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later."

ARGUMENT

I.

IN ITS DECISION IN THE INSTANT CASE THE MISSISSIPPI SUPREME COURT MISINTERPRETED THE TEACHINGS OF *BRADY V. MARYLAND*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194.

II.

WHERE EVIDENCE IS MATERIAL WITH PROBATIVE VALUE, THE PROSECUTION IS CHARGED WITH A DUTY OF PRESERVATION FOR THE PURPOSE OF DISCLOSURE AND IF THE GUILT OR INNOCENCE OF THE ACCUSED IS DEPENDENT UPON SUCH MATERIAL EVIDENCE AND IF THE PROSECUTORIAL BRANCH FAILS TO PRESERVE SUCH EVIDENCE, EITHER IN GOOD FAITH OR BAD FAITH, AND IS UNABLE TO DISCLOSE SUCH EVIDENCE UPON TIMELY REQUEST BEING MADE, THEN THE INDICTMENT AGAINST THE ACCUSED MUST BE DISMISSED.

The points here raised have not heretofore been before this Court.

In the interest of not being guilty of prolixity we shall argue the two points raised together, since each are in concert with the other.

The issues raised arise out of the following factual situations:

Petitioner here was arrested on the 14th day of February 1973, and charged with the illegal sale of a capsule or pill containing Lysergic Acid Diethylamide, commonly known as LSD: He was indicted by the Grand Jury of the April 1973 Term of the Circuit Court of Jackson County, Mississippi.

After indictment Petitioner, through his attorney, made a timely motion for production of a portion of the substance for independent chemical analysis. At the preliminary hearing, Petitioner was informed that no part of the substance was available for the reason it had been totally consumed through chemical analysis made by the Mississippi Crime Laboratory.

It was revealed through testimony of the trial that the narcotic agent, who allegedly made the purchase, had turned over the pill or capsule for analysis on July 24, 1972. On July 28, 1972, Harriett Pfaffman, toxicologist with the crime laboratory, had split the pill in half. She ran a chemical analysis on that day and she testified that the test revealed LSD. She further testified that several months later she discussed with Dr. Arthur S. Hume the matter of testing the other half of the pill or capsule to determine if it contained any substance other than LSD, such as mescaline, etc. Dr. Hume testified that he authorized it although he was aware that there was always the probability that the defense would request an independent analysis. The second half was tested on October 26, 1972, and no other substances were revealed in the pill. The pill was totally consumed.

It is interesting to note that these test were completed and the pill consumed almost six (6) months prior to the Defendant, Petitioner herein, being indicted and before the defense had an opportunity to become

aware of the substance or to make a request for disclosure for independent analysis.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215, the Court said:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196, 10 L.Ed.2d at 218.

On the trial of the instant case in the Circuit Court of Jackson County, Mississippi, after both the State and the defendant had announced "ready" a motion was made for dismissal and the following colloquy took place between Mr. Johnston, attorney for the defendant, and Mr. Lockard, the District Attorney:

BY MR. JOHNSTON: "Comes now the Defendant by and through his attorney of record and moves the Court for dismissal; and, in support of said motion, would show unto the Court that the Defendant requested of the State of Mississippi, by a motion, for the State to furnish him with sufficient quantities of the substance which was alleged by the State to be Lysergic Acid Diethylamide and alleged to have been purchased by the State Narcotics Agent, James R. Kelley, so that the Defense be allowed to have an independent chemical analysis of said substance."

BY MR. LOCKARD: "Your Honor, the State, in repose to –"

BY MR. JOHNSTON: "Subsequent to said motion and in compliance with said motion, the Defense counsel was furnished only with a letter from the Mississippi Crime Lab that stated that no part of the substance was remaining to be turned over to the Defense attorney; that the Defense now has been deprived of any defense that it might have

resulting from its own chemical analysis and that it places the State in the position of being the accuser, the witnesses, the Judge, and the executioner without the Defense having any ability whatsoever to offer a defense as to what actually was contained, if anything, in said transaction.

Further, that under the rules set down by the United States Supreme Court, the Defense counsel and Defendant is (sic) entitled to have a chemical analysis of the alleged substance allegedly purchased therefrom to the Defendant; that because of the aforesaid reasons the Defendant has been deprive of his right to a defense and particularly as to what, if anything, was sold or transferred to the agent for the State of Mississippi as alleged in said crime."

BY MR. LOCKARD: "Your Honor, the Defendant correctly stated he filed a motion that we furnish him with a sample for analysis; and, in contacting the lab, *there was only sufficient amount to run the one test by the State.* There was only one tablet, as the evidence will show. This tablet was used and consumed in the analysis run in the State Lab, so they have nothing, and the State has nothing to furnish the Defendant with." (Emphasis added) (Tr. pp. 9,10)

The Constitutional issues were first raised in the State Court, establishing this Court's jurisdiction.

The District Attorney, at this stage of the trial was apparently under the impression that the State Crime Lab has consumed the entire tablet or capsule in running *one test.* Subsequently, the testimony revealed there were *two test* run by the Crime Lab and that the two separate test were almost three (3) months apart.

In *United States v. Hibler*, 463 F.2d 455 (1972), The United States Court of Appeals (9th Circuit), stated:

"In guaging the nondisclosure in terms of due process, the focus must be on the essential fairness

of the procedure and not on the astuteness of either counsel."

Quoting *Barbee v. Warden*, 331 F.2d 842, the Court continued:

"We agree with the District of Columbia Circuit's description of the role of the prosecutor in situations like this:

" 'When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible and for the defense what is useful. ' 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." ' *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 620, 79 L.Ed. 1314.

As this Court stated in *Moore v. Illinois*, 408 U.S. 786, 33 L.Ed.2d 706, 92 S. Ct. 2562:

"Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. " 'A citizen has the right to expect fair dealing from his government, see Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed.2d 1012, 79 S. Ct. 968 and this entails . . . treating the government as a unit rather than as an amalgam of separate entities" ' S & E Contractors, Inc. v. United States, 406 U.S. 1, 10, 31 L.Ed.2d 658, 666, 92 S. Ct. 1411 (1972). " 'The prosecutor's office is an entity and as such it is the spokesman for the Government." ' Giglio v. United States, 405 U.S. 150, 154, 31 L.Ed.2d 104, 92 S. Ct. 763 (1972). See also Santobello v. New York, 404 U.S. 257, 262, 30 L.Ed.2d 427,

433, 92 S. Ct. 495 (1971); Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101, 92 S. Ct 2182 (1972)

Although the decision to run two separate test on the one pill or capsule was made by the Mississippi Crime Lab, nevertheless, it fell within the province of the prosecuting attorney to insure that the trial was fair and that the defendant had a right to expect fair dealing from the State.

Further, as this Court stated in *Giglio v. United States*, 405 U.S. 150, 31 L.Ed.2d 104, 92 S. Ct. 763:

> ". . . . Moreover, whether the nondisclosure was a result of negligence or design it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.
>
> ". . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."

In the instant case the indictment charged the defendant with the felonious sale of a certain controlled substance, Lysergic Acid Diethylamide, to James R. Kelly, for the sum of $2.00. The capsule of alleged LSD was material evidence with probative value. It was consumed in two separate test and was thereby suppressed, irrespective "of the good faith or bad faith of the prosecution," and such occurred almost *six (6) months prior to* the indictment of the Defendant.

In its decision the Mississippi Supreme Court stated that *Brady, supra,* was not applicable for several reasons:

Quoting the decision:

"This case is not applicable for several reasons. First, no indication exists that the evidence was

favorable to the accused. Secondly, there is no intimation in this record of any " 'Suppresssion by the prosecution." ' At the pre-trial hearing, the prosecution presented the defense with a letter from the Mississippi Crime Laboratory informing the defendant that no part of the substance remained, since the tablet had been consumed in analysis. The testimony of Harriet Pfaffman, the toxicologist for the Crime Laboratory, and Dr. Arthur Hume, the director, indicates there was no effort on their part to *suppress intentionally* the evidence from the defendant. *Brady* is inapplicable to this case. (Emphasis added)

We respectfully submit that the Mississippi Supreme Court in its decision misinterpreted the teachings of *Brady*.

Brady does not require that the suppression by the prosecution be an intentional one nor does it require that an accused be burdened with the task or proving that the material evidence is favorable. As this Court stated in *Giglio, supra:*

". . . . Thereafter *Brady v. Maryland,* held that *suppression of material evidence* justifies a new trial ' "irrespective of the good faith or bad faith of the Prosecution." ' (Emphasis added)

As to Point II, raised in this Argument, the United States Court of Appeals, District of Columbia Circuit, has, in recent decisions, stated:

"Technically, it may be that evidence which cannot be found is not in the Government's " 'possession." ' And, of course, that which the Government does not have it cannot disclose. But this line of reasoning is far to (sic) facile, and clearly self-defeating. The language of *Brady*, rule 16 and the *Jencks* Act includes no reference to the timing of possession and suppression It is most consistent with the purpose of those safeguards to hold that the duty of disclosure attaches in some

> form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before Defendants hear of its existance. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." See *United States v. Gilbert*, 476 F.2d 1170 (1973) See also *United States v. Bryant*, 439 F.2d 642 (1971)

We submit, the duty of preservation attaches to the duty of disclosure and the above is eminently correct in the instant case.

As this Court stated in *Chapman v. State of California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705:

> "Before a Federal Constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The suppression of the material evidence in the instant case can not be held harmless beyond a reasonable doubt.

The evidence was of probative value and went to the guilt or innocence of the accused and irrespective of whether the suppression of the evidence was in good faith or bad faith was error under the teachings of *Brady, supra*.

As this Court said in *United States v. Ash*, 37 L.Ed.2d 619:

> "Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory test may be contrived. In many ways the prosecutor, by

> accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may " 'strike hard blows' " but not " 'foul ones.' " (Emphasis added)

In summary, it is apparent that the Mississippi Supreme Court has misinterpreted the teachings of *Brady* for it has placed the burden upon the Defendant to show an intentional suppression by the State of material evidence which went to the guilt of the Defendant, when in fact, an arm of the Prosecutorial Branch had consumed all the evidence through chemical analysis, either through good faith or bad faith. Such decision and the action of the trial court in denying Defendant's motion to dismiss has denied the defendant, petitioner here, due process as provided by the Constitution. There is no question that the Courts are in need of guidance from this Court as to the questions herein raised.

CONCLUSION

The Judgment of the Mississippi Supreme Court, premised as it is on a misinterpretation of the teachings of *Brady*, should be reversed and Petitioner request a reversal.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,747

JIM POOLE	)	
	)	
v.	)	7305
	)	
STATE OF MISSISSIPPI	)	

GILLESPIE, CHIEF JUSTICE:

Jim Poole was convicted in the Circuit Court of Jackson County of selling lysergic acid diethylamide (LSD) and sentenced to ten years in the penitentiary.

Defendant sold one tablet of LSD to an agent of the Bureau of Narcotics. The agent took the tablet to the Mississippi State Crime Laboratory where it was scientifically tested and determined to be LSD. Miss Harriet Pfaffman, who made the original examination of one-half of the tablet on July 28, 1972, about six days after the tablet was sold to the agent, thereafter consulted with Dr. Arthur S. Hume, the Director of the Crime Laboratory. Dr. Hume suggested that Miss Pfaffman use the remainder of the tablet for analysis, becuase they "judged it necessary to analyze the other half for any other drugs, such as mescaline or drugs that are quite frequently found mixed with LSD." There was no proof that the remaining half of the tablet was consumed in the laboratory analysis in order to deprive the defendant of the opportunity to have his own chemist examine the evidence. At the time of the examination of the evidence, the defendant had not been arrested and charged with selling LSD.

The defendant was arrested some months after the completion of the laboratory examination of the tablet

in question, and upon being indicted, he moved the court to direct the state to furnish him sufficient quantities of the substance alleged to be LSD for the purpose of making an independent chemical analysis of the tablet. Since the entire tablet had been consumed in the laboratory test and there could be no compliance with defendant's motion, he moved the court for a dismissal.

The sole question is whether the trial court erred in not granting the dismissal because the entire tablet had been consumed in the process of the state's analysis. The stated question has several points of inquiry.

1. Defendant relies on section 41-29-154, Mississippi Code Annotated (Supp. 1973), which provides:

> Any controlled substance seized under the authority of this article or any other law of Mississippi or of the United States, may be destroyed, adulterated and disposed of or otherwise rendered harmless and disposed of, upon written authorization of, and in the discretion of the director, after such substance has served its usefulness as evidence or after such substance is no longer useful for training or demonstration purposes.

Defendant argues that the LSD was destroyed before it served its usefulness as evidence, i.e., before defendant could have it analyzed for his own evidentiary purposes.

We find no merit in this argument. The purpose of this statute was to authorize the state to destroy drugs intentionally after such substances were no longer needed for evidence. There is no indication that the statute should be construed so as to prohibit the exhaustion of the substnace during chemical analysis. The statute is concerned with a procedure for destroying a substance known to be a dangerous drug, not with the process of determining whether a substance is a dangerous drug.

2. Defendant relies on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), wherein it was said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218.

This case is not applicable for several reasons. First, no indication exists that the evidence was favorable to the accused. Secondly, there is no intimation in this record of any "suppression by the prosecution." At the pre-trial hearing, the prosecution presented the defense with a letter from the Mississippi Crime Laboratory informing the defendant that no part of the substance remained, since the tablet had been consumed in analysis. The testimony of Harriet Pfaffman, the toxicologist for the Crime Laboratory, and Dr. Arthur Hume, the director, indicates there was no effort on their part to suppress intentionally the evidence from the defendant. *Brady* is inapplicable to this case.

3. Defendant argues that due process required the state to make the substance available to him for inspection and analysis. Since the state's own act exhausted the substance claimed to be contraband, the evidence should be suppressed. He relies on *Jackson v. State*, 243 So.2d 396 (Miss. 1970), which held that in cases of "possession or sale of a prohibited substance where the outcome of the case is dependent upon its identification as contraband," due process requires making the substance available to the defendant for inspection and analysis.

Jackson applies where the state has some of the substance. The narrow question before the Court is whether the case against defendant should be dismissed

when the state is unable to make the substance available to defendant because it was consumed in the process of analysis.

The testimony shows that it was reasonably necessary to consume the entire tablet in the process of determining what drug or drugs were contained therein. There is no proof of an attempt by the state to exhaust the tablet in order to deprive defendant of the right to inspection and analysis.

In *People v. Sacchitella*, 73 Misc.2d 678, 343 N.Y.S. 2d 169 (Sup.Ct. 1973), the Court held that the failure of the state to furnish defendant with a paper bag and money given by a police informer to defendant did not warrant dismissal of the charge. The money appears to have been taken from defendant by the police and given to the informer who spent it in violation of police regulations. The fact was that the evidence did not exist, and the Court said this was not a case of suppression or withholding of exculpatory evidence and that absence of the evidence under these circumstances neither warranted dismissal of the charges nor denied defendant a fair trial.

In *State v. Cloutier*, 302 A.2d 84 (Me. 1973), the defendant was indicted for the sale of one tablet of LSD. The state consumed three-fourths of the tablet in its analysis, and the remaining one-fourth was admitted as a state's exhibit. The defendant wanted to conduct his own independent analysis of this remaining one-fourth, and the Supreme Court of Maine was compelled to construe their criminal discovery rule. The Court held that each case involving narcotics must be decided upon its own particular set of facts with regard to the reasonableness of the request and the possible safeguards which could be imposed. The Court then discussed the case of *Jackson v. State*, 243 So.2d 396 (Miss. 1970), and stated:

> Obviously, the problem facing the Mississippi Court was minimized by the quantity of marijuana available for testing. We do not think that it necessarily follows that the Court would have reached the same result if it had been dealing with a relatively minute quantity of LSD-25 or that the Court would have hesitated to impose a rule of reasonableness in judging the merits of a specific request. 302 A.2d at 88.

The Court then concluded as follows by discussing what the trial judge could do in such a situation:

> [The trial court] may in circumstances not unlike those existing in the instant case, when he is satisfied that the quantity of substance remaining in the State's possession is not sufficient to permit adequate and accurate testing or that the remaining substance must be preserved for evidentiary use at trial or that any other valid reason for such action exists, decline to permit any use of the substance for independent analysis. In the latter event the defendant's analyst will of necessity be compelled to limit his investigation to consultation with the State's analyst and an examination of the State's laboratory facilities and testing methods. An abuse of discretion will be shown only when the record discloses an arbitrary refusal to grant a reasonable and feasible request or a reasonable modification thereof. 302 A.2d at 89.

Alaska dealt with the question in *Lee v. State*, 511 P.2d 1076 (Alaska 1973), involving a charge of possession of a narcotic drug, heroin. Defendant argued that the court erred in admitting the laboratory analysis of the material found in one of four balloons found in his pockets on the ground that the entire amount found in the balloon was used in analysis and he was denied due process of law because he was deprived of independent examination of the substance. In rejecting defendant's argument, the Court said:

In those cases where expert analysis exhausts the substance there is clearly no error in the admission of evidence regarding the analysis in the absence of allegations and proof of deliberate destruction, or delibertate attempts to avoid discovery of evidence beneficial to the defense. 511 P.2d at 1077.

The record does not indicate that the state deliberately destroyed the substance in an attempt to avoid making it available to defendant. Due process does not require the dismissal of the charges; the state is unable to comply with defendant's motion, because the substance was exhausted in the process of analysis.

AFFIRMED.

ROBERTSON, SUGG, WALKER AND BROOM, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI

MARCH 11, 1974, COURT SITTING : : : : : : : : : : : : :

JIM POOLE

#47,747 vs.

STATE OF MISSISSIPPI

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Jackson County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 8th day of May 1973 a conviction of DISTRIBUTING CONTROLLED SUB-

STANCE WITHOUT AUTHORITY – and a sentence to serve a term of TEN YEARS in the State Penitentiary – be and the same is hereby affirmed. It is further ordered and adjudged that the appellant do pay the costs of this appeal to be taxed.

MINUTE BOOK "BQ" PAGE 392

IN THE SUPREME COURT OF MISSISSIPPI

APRIL 8, 1974, COURT SITTING : : : : : : : : : : : : : : :

JIM POOLE

#47,747 vs.

STATE OF MISSISSIPPI

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK "BQ" PAGE 413

SUPREME COURT, U. S.

FILED

OCT 23 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1999

JIM POOLE,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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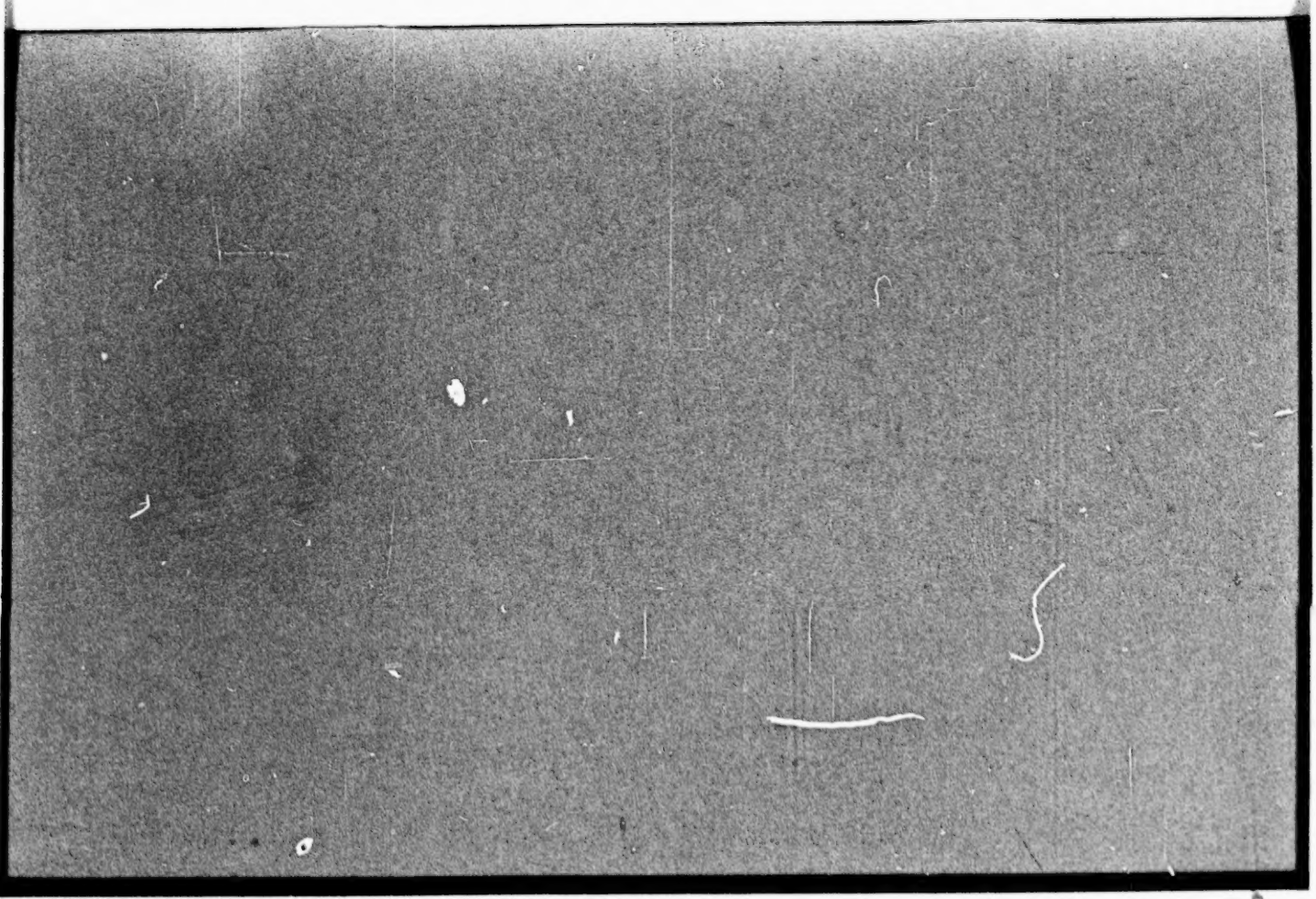

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1999

JIM POOLE,
Petitioner,

VS.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi (Petitioner's Appendix A) is reported as *Poole* v. *State*, 291 So.2d 723 (Miss. 1974).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Whether the Mississippi Supreme Court misinterpreted *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) by holding the due process rights of petitioner were not violated when the single tablet sold by petitioner to an agent of the Bureau of Narcotics was totally consumed through chemical analysis conducted at the state crime laboratory and thus no portion of it was available at the time a request was made for a sample to be used in conducting an independent analysis?

(2) Whether the inability of the State to preserve the evidence must result in dismissal of the indictment?

STATEMENT OF THE CASE

On July 22, 1972, Petitioner sold one tablet LSD to an agent of the Bureau of Narcotics for a purchase price of $2.00. The agent then took the tablet to the Mississippi Crime Laboratory and on July 28, 1972, Harriott Pfaffman, a toxicologist employed by the laboratory, conducted certain scientific tests on one half of the tablet and as a result of this analysis determined that the tablet contained LSD.

The toxicologist then consulted with Dr. Arthur S. Hume, the Director of the Crime Laboratory, who suggested that the remainder of the tablet be analyzed because they "judged it necessary to analyze the other half for any other drugs, such as mescaline or drugs that are quite frequently found mixed with LSD." Miss Pfaffman said she finished the analysis on the second half of the tablet in October ". . . because I was having trouble with the tablet determining what else was in it; so, therefore, it

took me a while to determine that the other [second] test proved that it contained no other dangerous drugs other than LSD."

There was no proof that the remaining half of the tablet was consumed in the laboratory analysis in order to deprive the defendant of the opportunity to have his own chemist conduct tests on the evidence. In fact, at the time of the examination of this substance the defendant had not been arrested and charged with the sale of LSD.

On February 14, 1973, Jim Poole was arrested and thereafter was indicted by the grand jury of Jackson County, Mississippi, in April, 1973. Thereafter, on April 25, 1973 a Motion for Production of a Portion of the Substance for independent chemical analysis was filed. In an attempt to comply with this motion the district attorney contacted the crime laboratory and received a letter stating that the single tablet had been totally consumed in testing. A copy of this letter had also been sent to defense counsel.

At the start of the trial on May 4, 1973, the defendant moved for a dismissal of the charges against him on grounds the substance had not been turned over to him and thus he was deprived of any defense that might have resulted from an independent chemical analysis.

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that his due process rights had been violated by the inability of the State to turn over a substance which had been totally consumed in testing.

Furthermore, the opinion of the Mississippi Supreme Court is not at variance with the applicable decisions of this Court.

ARGUMENT

Petitioner would urge that the Mississippi Supreme Court has misinterpreted the teachings of *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) wherein it was held:

> We now hold that the *suppression* by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (Emphasis added) (373 U.S. at 87, 10 L.Ed.2d at 218)

There the Court was considering suppression of evidence by the prosecution during trial. It is well settled that *Brady* does not deal with pre-trial discovery. *United States* v. *Moore*, 439 F.2d 1107 (6 Cir. 1971); *United States* v. *Evanchik*, 413 F.2d 950 (2 Cir. 1969); *United States* v. *Harris*, 458 F.2d 670 (5 Cir. 1972); *United States* v. *Jordan*, 399 F.2d 610 (2 Cir.), cert. den. 393 U.S. 1005, 89 S.Ct. 496, 21 L.Ed.2d 469 (1968); *United States* v. *Bailey Manufacturing Corporation*, 345 F.Supp. 410 (E.D. La. 1972).

Assuming only for the sake of argument that *Brady* could be made to apply to the instant case, petitioner's argument must yet fail for in *Moore* v. *Illinois*, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972), it was stated:

> the standards by which the prosecution's conduct is to be measured under the *Brady* rule are as follows:
>
> There must be (a) a suppression by the prosecution *after* a request by the defense, (b) the evidence must be favorable to the defense, and (c) it must be material. (33 L.Ed.2d 706, 713)

Quite obviously there was no suppression by the prosecution after a request by the defense and certainly there was no showing that the evidence would be favorable to the defense. Respondent admits the unavailable evidence was material. However, there was no showing that it would have been helpful or have a tendency to exonerate the accused by reason of its probative effect.

Respondent submits that petitioner's second contention, i.e., that inability to produce the substance for independent testing must result in dismissal of the indictment is without merit.

The case of *State of Maine* v. *Cloutier,* 302 A.2d 84 (Me. 1973) presents a very similar factual situation to the instant case. There the State took possession of one tablet alleged to be LSD. The analysis of this pill required using three-fourths of it. The defendant filed a Motion for Chemical Analysis of the drug by an independent chemist. The Court denied his motion and the Supreme Court of Maine held that it was not error to overrule the defendant's motion:

> In Jackson v. State, (1971-Miss.) 243 So.2d 396 the State had in its possession 12 boxes of matchbox size "filled" with marijuana. The Court, acting not under a Rule but pursuant to its inherent power to provide "due process" and "fair trial," held the refusal of the trial court to make a portion of the substance available to the defendant to be an abuse of discretion. *Obviously, the problem facing the Mississippi Court was minimized by the quantity of marijuana available for testing.* We do not think that it necessarily follows that the Court would have reached the same result if it had been dealing with a relatively minute quantity of LSD-25 or that the Court would have hesitated to impose a rule of reasonableness in judging the merits

of a specific request. (302 A.2d 84 at 88) (Emphasis added)

And, in laying a foundation for the treatment of future requests for independent analysis, it was held:

> With the increasing volume of cases involving the unlawful possession and sale of drugs, we can anticipate that many motions for independent drug analysis will be addressed to the trial courts which, we emphasize, must be considered and decided in accordance with their varying facts on a case by case basis. The preferred practice will be to give prima facie support to the motion by an affidavit of facts tending to show the reasonableness and feasibility of an independent analysis. The defendant may be preliminarily aided by a full disclosure by the State as to the alleged nature and quantity of the substance which came into the possession of the State, the nature and results of tests made by the State and the quantity of the substance still remaining in the State's possession. This information, to which the defendant is justly entitled, will assist the defendant in formulating a request which is reasonable and feasible under the existing circumstances. The use of an affidavit by the defendant will afford the State an opportunity to file a counter-affidavit effectively identifying disputed issues of fact, if any there be, which must be resolved by a hearing on the motion. *The trial court should approach the resolution of the problem with a disposition to permit an independent analysis at the State's expense if one is reasonable and practicable under the existing circumstances.*
>
> *Although he is not bound to do so, he may in the exercise of a sound discretion, especially where so-*

called "hard" drugs are involved, decline to order the sample released from the State's possession and require that the independent analysis be performed at the State's laboratory and/or under the State's supervision. (citations omitted). *He may in circumstances not unlike those existing in the instant case, when he is satisfied that the quantity of substance remaining in the State's possession is not sufficient to permit adequate and accurate testing or that the remaining substance must be preserved for evidentiary use at trial or that any other valid reason for such action exists, decline to permit any use of the substance for independent analysis.* In the latter event the defendant's analyst will of necessity be compelled to limit his investigation to consultation with the State's analyst and an examination of the State's laboratory facilities and testing methods. *An abuse of discretion will be shown only when the record discloses an arbitrary refusal to grant a reasonable and feasible request or a reasonable modification thereof.* The defendant must bear in mind his obligation to build an adequate record, that being indispensable to appellate review. (Emphasis added) (302 A.2d 84 at 89)

In the case of *Blanchard* v. *U. S.*, 360 F.2d 318 (5th Cir. 1966), the substance alleged to be a narcotic was tested by a chemist hired by the Government and then destroyed in accordance with procedures normally followed by the Drug Disposal Committee of Federal Narcotics Bureau. After the substance had been destroyed, the defendant filed a motion for production of the narcotics referred to in the indictment. When none was forthcoming, and upon conviction, an appeal was taken assigning as error the trial court's refusal to dismiss the indictment because

the Government failed to produce the narcotics. The United States Court of Appeals for the Fifth Circuit held:

> The trial court was correct in refusing to dismiss the indictment upon the failure of the Government to produce the narcotics, since it is not essential that the narcotics involved be offered and received in evidence as exhibits. Ware v. United States, 8th Cir. 1958, 259 F.2d 442; United States v. Bailey, 7th Cir. 1960, 277 F.2d 560, 565. (360 F.2d 318 at 320)

The Court went on to cite with approval the holding in *Ware* v. *United States*, 8th Cir. 1958, 259 F.2d 442, quoting *U. S.* v. *Singer*, 43 F.Supp. 863 (E.D. N.Y. 1942):

> Further, the mere fact that the sample was lost or destroyed, after analysis, does not prevent proof of such analysis, evidence having been offered to identify the sample analyzed, with the articles seized, and the loss or destruction of the sample goes solely to the weight of the evidence, which is for the Jury to pass upon. (360 F.2d 318 at 320)

In *People* v. *Sacchitella*, 343 N.Y.S.2d 169 (1973), the defendant was charged with the illegal sale of heroin which a police informer had allegedly purchased from the defendant with $2,400.00 contained in a brown paper bag. After the defendant was arrested, he filed a motion to require the District Attorney to produce the bag and the money which the prosecution was unable to produce as the items, by the time the motion to produce was filed, were unavailable. The New York Supreme Court held:

> It is now beyond dispute that the prosecution is required to produce, make available or make known the existence of physical or other evidence which may be exculpatory. (Brady v. Maryland, 373 U.S. 83,

83 S.Ct. 1194, 10 L.Ed.2d 215; People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853; Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; Barbee v. Warden, 4 Cir., 331 F.2d 842)

* * *

However, nothing in these and similar cases authorizes a dismissal of the indictment where it is clear that the evidence sought is no longer in existence.

* * *

This is not a case of suppression or withholding of exculpatory evidence. The record is clear, up to this point, that the evidence does not exist. Its absence under such circumstances does not warrant dismissal of the indictment or a holding that defendant will be denied a fair trial if the evidence is not produced. (343 N.Y.S.2d 169 at 171, 172)

CONCLUSION

Respondent respectfully submits that there has been no violation of petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. The petitioner's circumstances pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the Petition for Writ of Certiorari should in all justice be denied as being without merit.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: KAREN GILFOY
Special Assistant Attorney General

CERTIFICATE

I, Karen Gilfoy, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief In Opposition to Petition For a Writ of Certiorari to the Supreme Court of Mississippi to Albert S. Johnston, III, Johnston, Pritchard & Wright, 705 Watts Avenue, Post Office Box 1087, Pascagoula, Mississippi 39567.

This the 22nd day of October, A. D. 1974.

KAREN GILFOY
Special Assistant Attorney General